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Company

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

OHIO SECURITY INSURANCE
COMPANY,

Plaintiff,

v.

PDX NAILS LLC; HAI NGUYEN; TAM
NGUYEN; and S.R.,

Defendants.

Civil No.: _____

**COMPLAINT FOR DECLARATORY
JUDGMENT**

Plaintiff Ohio Security Insurance Company (“Plaintiff”) hereby alleges as follows:

INTRODUCTION

1. This is an action for declaratory relief and judgment pursuant to 28 U.S.C.

§§ 2201 and 2202. Plaintiff Ohio Security Insurance Company (“OSIC”) seeks a declaration of its rights and obligations as to Defendants Hai Nguyen and Tam Nguyen, individually, and

d/b/a PDX NAILS LLC (“PDX NAILS”), and S.R. under a certain policy of insurance issued

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COMPLAINT FOR DECLARATORY JUDGMENT

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by OSIC. The matter that gives rise to OSIC seeking such a declaration is an underlying lawsuit that was filed against Hai Nguyen, Tam Nguyen and PDX NAILS wherein the underlying plaintiff, “S.R.,” alleges that she contracted herpes while having her nails done at PDX NAILS.

PARTIES

2. Plaintiff OSIC is a New Hampshire corporation engaged in the business of insurance. OSIC’s principal place of business is in Boston, Massachusetts.

3. Defendant Tam Nguyen is listed as the manager and registered agent of PDX NAILS on the State of Oregon Business Registry and as owner of PDX NAILS in its Articles of Incorporation, and on information and belief, is a resident of the State of Oregon.

4. Defendant Hai Nguyen is listed as a member of PDX NAILS on the State of Oregon Business Registry and an owner of PDX Nails on its Articles of Incorporation, and on information and belief, is a resident of the State of Oregon.

5. Defendant PDX NAILS LLC is an Oregon Limited Liability Company with its principal place of business located at 2532 S.E. 122nd Avenue, Portland, in Multnomah County, Oregon. PDX NAILS operated as a nail salon in two locations located in Portland, Oregon – 11946 N.E. Glisan, and 2532 S.E. 122nd.

6. Defendant “S.R.” is alleged to be a 23-year-old female resident of Clackamas County, Oregon. S.R. is the plaintiff in an action pending against the Nguyens and PDX NAILS in the Circuit Court for Multnomah County, Oregon, entitled *S.R. v. PDX NAILS, LLC, an Oregon Limited Liability Company, TAM NGUYEN and HAI NGUYEN*, Case No. 24CV11180 (the “Underlying Lawsuit”).

7. S.R. is named herein for the purpose of having the judgment, decisions, and orders of the Court in the instant action be binding upon her.

8. At all times material, Defendant Tam Nguyen was the authorized representative and manager for PDX NAILS; see PDX Nails Corporate Filings dated January 6, 2020, and Amended Annual Reports dated December 7, 2022, and December 12, 2023, copies of which are attached hereto collectively as “Exhibit A.”

9. At all times material, Defendant Hai Nguyen was a member of PDX NAILS LLC; see PDX NAILS Corporate Filing dated January 6, 2020, and Amended Annual Reports dated December 7, 2022, and December 12, 2023, copies of which are attached hereto collectively as “Exhibit A.”

10. PDX NAILS LLC is a successor name for PDX NAILS with the same principals as members and owners and operating at the same locations as PDX NAILS. See Assumed Business Name – Cancellation Registry Number 1596735-90 dated January 6, 2020, with the Oregon Secretary of State and attached hereto as “Exhibit B.”

JURISDICTION AND VENUE

11. This is a proceeding for declaratory relief pursuant to Title 28 of the United States Code, § 2201, *et seq.*, to determine the scope of the respective rights, duties and obligations, if any, of OSIC as to PDX NAILS, Tam Nguyen and Hai Nguyen under certain contracts of insurance with respect to the Underlying Lawsuit.

12. Jurisdiction for this proceeding is proper in federal court pursuant to 28 U.S.C. § 1332(a)(1) and (c)(1) because the parties are citizens of different States and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

13. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to this Complaint for Declaratory Judgment allegedly occurred in this district. The proper “divisional venue” for this action is in the Portland Division, pursuant to 28 U.S.C. § 117 and Civil Practice Local Rule 3-2, as a substantial part of the events or omissions giving rise to this claim occurred within Multnomah County.

14. An actual controversy exists between the parties as to whether OSIC has a duty to defend or indemnify any of PDX NAILS, Tam Nguyen, Hai Nguyen or S.R with respect to the Underlying Lawsuit.

FACTUAL BACKGROUND

A. The Underlying Lawsuit

15. On March 5, 2024, underlying Plaintiff S.R. filed her complaint in the Underlying Lawsuit (the underlying “Complaint”) against PDX NAILS, Tam Nguyen and Hai Nguyen in Multnomah County Circuit Court. A copy of the Complaint is attached hereto as “Exhibit C.” Plaintiff is seeking in excess of \$1.75 million in damages, fees and costs.

16. In the Complaint, the Plaintiff alleges that during a June 1, 2023, manicure at the Glisan Street location of PDX NAILS, a technician in the employ of and in the course and scope of work for PDX NAILS did not wear gloves and used unsanitary equipment to apply S.R.’s acrylic nails. She alleges this equipment was not disinfected and, as a result, she developed redness and inflammation around her left index finger and cuticle. Following the onset of inflammation, S.R. alleges she visited an urgent care clinic where her finger was swabbed and the sample sent for culture. Plaintiff claims she was eventually diagnosed with Herpes Simplex Virus 2 (HSV 2) – Genital Herpes, or Herpetic Whitlow, on her finger.

17. The Plaintiff alleges that she did not have Herpes prior to her PDX NAILS procedure and developed it around her nail area and on her fingers following her manicure at PDX NAILS by a PDX NAILS technician.

18. The Plaintiff alleges that as a result of contracting an incurable virus, she will continue to experience outbreaks and must wear bandaging to prevent the spread of the virus.

19. Plaintiff alleges that as a result of contracting an incurable virus, she experienced and continues to experience emotional distress, worry, anguish and concern over “future ramifications” for her, any partners and future children.

20. The summary of Plaintiff’s counts is that she contracted a communicable disease in the form of an incurable Herpes virus from the unsanitary conditions and equipment in the PDX NAILS salon, that she was injured as a result and seeks financial compensation from PDX NAILS, Tam Nguyen and Hai Nguyen for these injuries.

First Claim for Relief – Count One: Common Law Negligence – Herpes Simplex Virus 2 and Herpetic Whitlow (against PDX NAILS).

21. The first claim for relief for negligence alleges that PDX NAILS and its agents knew or should have known of the risk of harm posed to the Plaintiff by not maintaining clean equipment or wearing gloves and of the risk of infection in trimming and cutting nails and cuticles. The allegations are that PDX NAILS fell below the standard of care applicable to nail salons, were negligent, and unreasonably created a foreseeable risk of harm to S.R. by failing to properly sanitize manicure equipment including that used on S.R.; failing to track clean and used equipment; failing to properly store equipment including that used on S.R., failing to require technicians to wear gloves; and failing to prevent the HSV 2 that S.R.

incurred and, that as a directly foreseeable result, S.R. contracted HSV 2 and Herpetic Whitlow.

Count Two: Negligent Training and Supervision (against Tam Nguyen and Hai Nguyen).

22. Plaintiff alleges that as members, owners and managers of PDX NAILS, the Nguyens are responsible for training and supervision of the nail technicians and were aware of the risk of harm to S.R. in not maintaining clean equipment, not requiring nail technicians to wear gloves and the dangers of infection when trimming and cutting nails and cuticles, and had been issued a fine for failing to disinfect and clean tools and equipment.

23. Plaintiff alleges that the Nguyens fell below the standard of care applicable to nail salon owners, were negligent and created an unreasonable and foreseeable risk of harm to S.R. by failing to train employees to properly sanitize and store manicure tools and implements, not maintaining clean manicure equipment, failing to install an appropriate policy for employees and nail technicians to properly sanitize and store manicure tools; failing to train employees to properly track used equipment from clean equipment and failing to train employees on infectious disease prevention including not over trimming and cutting cuticles during a manicure.

24. Plaintiff alleges that as a directly foreseeable result of the Nguyens' negligence, S.R. contracted HSV 2 and Herpetic Whitlow which would not have happened in the absence of their negligence.

Count Three: Negligence Per Se (against PDX NAILS).

25. Plaintiff alleges PDX NAILS and its agents failed to adhere to all applicable regulations within OAR Chapter 817, Division 10 (Safety and Infection Control), specifically

OAR 817-010-0068, by not ensuring properly sterilized equipment, OAR 817-0075, by not ensuring proper clean storage of equipment, resulting in S.R. contracting HSV 2 and Herpetic Whitlow which would not have happened in the absence of the above violations.

Second Claim for Relief: Unlawful Trade Practice – ORS 646.638 (against PDX NAILS).

26. Plaintiff alleges PDX NAILS willfully violated ORS 646.638 which provides a private right of action for violation of ORS 646.608.

27. Plaintiff alleges PDX NAILS willfully violated the above provisions by falsely representing to clients that they adhere to strict sanitation protocols and have a safe and hygienic environment for their clients, including S.R., and that as a direct and foreseeable result S.R. is entitled to recover for her injuries and damages as alleged in the Complaint (specifically, contracting HSV 2, Herpetic Whitlow, emotional distress, pain, bodily injury, worry and anguish over her incurable infection and risks to future partners and children).

Defense Under a Reservation of Rights

28. OSIC has been, and continues to defend PDX Nails, and Hai and Tam Nguyen under a reservation of rights. Attached hereto as “Exhibit D” is a copy of a Reservation of Rights Letter, dated June 28, 2024.

B. The Insurance Policy

29. OSIC issued Commercial Protector package policy number BZS (24) 64 70 94 77 (the “Policy”) to Hai Nguyen d/b/a PDX NAILS with effective dates of April 21, 2023, through April 21, 2024. A certified copy of the policy is attached hereto as “Exhibit E.”

30. The Policy is subject to a Businessowners Coverage Form (No. BP 00 03 07 13) which contains the following relevant coverage grant:

BUSINESSOWNERS COVERAGE FORM

(BP 00 03 07 13 Insurance Services Office, Inc., 2012 Pages
1 of 61)

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this Coverage Form the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the company providing this insurance.

In Section II - Liability, the word "insured" means any person or organization qualifying as such under Paragraph C. Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Paragraph H. Property Definitions in Section I - Property and Paragraph F. Liability And Medical Expenses Definitions in Section II – Liability.

SECTION II - LIABILITY

A. Coverages

1. Business Liability

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury", "property damage" or "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" or any offense and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Paragraph D. Liability And Medical Expenses Limits Of

Insurance in Section II - Liability; and

- (2) Our right and duty to defend end when we have used up the applicable Limit of Insurance in the payment of judgments or settlements or medical expenses.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Paragraph f. Coverage Extension - Supplementary Payments.

The Businessowners Coverage Form contains the following exclusions:

B. Exclusions

1. Applicable To Business Liability Coverage

This insurance does not apply to:

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

j. Professional Services

"Bodily injury", "property damage" or "personal and advertising injury" caused by the rendering or failure to render any professional service. This includes but is not limited to:

- (1) Legal, accounting or advertising services;
- (2) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications;
- (3) Supervisory, inspection or engineering services;
- (4) Medical, surgical, dental, X-ray or nursing services treatment, advice or instruction;
- (5) Any health or therapeutic service treatment, advice or instruction;
- (6) Any service, treatment, advice or instruction for the purpose of appearance or skin enhancement, hair removal or replacement or personal grooming;
- (7) Optometry or optical or hearing aid services including the prescribing, preparation, fitting, demonstration or distribution of ophthalmic lenses and similar products or hearing aid devices;
- (8) Body piercing services; and
- (9) Services in the practice of pharmacy.

This exclusion applies even if the claims allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by an insured, if the

"occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering or failure to render of any professional service.

31. The Policy contains the following "Who is An Insured" provision:

C. Who Is An Insured

1. If you are designated in the Declarations as:

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners and their spouses are also insureds, but only with respect to the conduct of your business.
- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
- e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

2. Each of the following is also an insured:

- a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability

company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:

(1) "Bodily injury" or "personal and advertising injury":

- (a)** To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), or to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;
- (b)** To the spouse, child, parent, brother or sister of that co-"employee" as a consequence of Paragraph **(a)** above;
- (c)** For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraph **(a)** or **(b)**; or
- (d)** Arising out of his or her providing or failing to provide professional health care services.

(2) "Property damage" to property:

- (a)** Owned, occupied or used by;
- (b)** Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by; you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

b. Any person (other than your "employee" or

"volunteer worker"), or any organization while acting as your real estate manager.

- c. Any person or organization having proper temporary custody of your property if you die, but only:
 - (1) With respect to liability arising out of the maintenance or use of that property; and
 - (2) Until your legal representative has been appointed.
- d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this policy.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

32. The Policy also contains a Barber/Styling Salon Professional Liability Endorsement (No. BP 79 02 06 09) which provides an additional coverage grant for certain specified professional services. That endorsement modifies coverage under the Businessowners Coverage Form and contains the following pertinent language:

I. Section II - Liability is amended as follows:

- A. Paragraph A.** Coverages also applies to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render professional services in connection with the operation of your business as a Day Spa, Nail Salon, Barber Shop or Beauty Salon, including treatment, advice or instruction for the purposes of appearance or skin enhancement or personal grooming or therapy.

C. Item B.1. of Exclusions is modified as follows:

- 1. Paragraph 1.b.** Contractual Liability is replaced by the following:

This insurance does not apply to:

- b. "Bodily injury", "property damage", "personal and advertising injury" or other injury for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.
 2. Exclusion j., k.(6) and m. do not apply to beautician, manicurist or barber services nor to an insured doing business as a Day Spa, Nail Salon, Beauty Shop or Barber Shop.
- D. The following are added to Exclusions:

This insurance does not apply to "bodily injury", "property damage", "personal and advertising injury" or other injury arising out of:

1. Products:
 - a. Manufactured;
 - b. Prepared;
 - c. Rebottled; or
 - d. Repackedby you or sold under your label for use away from the premises to which this insurance applies.
2. The violation of any statute or governmental rule or regulation; however, this exclusion does not apply to the failure to perform a predisposition of skin test.
3. Any equipment or process used to change the pigmentation of the skin.
4. Body massage (other than facial, hand or foot massage).
5. Any medical or surgical service, treatment, advice or instruction, including, but not limited to podiatry, chiropody, plastic surgery, face lifting, removal of warts, moles or growths or any attempt at these by anyone.
6. The attachment of eyelash extensions by means of bonding extensions to individual eye lashes.
7. Failure to comply with the manufacturers' instructions related to the care, cleaning and maintenance of any equipment used in connection

with your business.

8. Any process or procedure used to remove hair, other than waxing or manual tweezing or cutting.
9. The use, administration or application of any dye to eyelashes or eyebrows except mascara or eyebrow pencils.
10. The operation of a training school or course of instruction in beauty culture or barbering.
11. Hair Implanting or hair transplanting or any attempt at these.
12. Body piercing (other than ear piercing).
13. Tattooing, including, but not limited to the insertion of pigment into or under the skin.
14. Any process or procedure, other than topical enzyme exfoliation, used to remove layers of skin including, but not limited to chemical peels, Intense Pulsed Light therapy or laser therapy.
15. The furnishing or dispensing of drugs, supplements or medical, dental or surgical supplies or appliances.
16. Any service, treatment, advice or instruction relating to physical fitness, including service, treatment, advice or instruction in connection with diet, cardio-vascular fitness, body building or physical training programs.

E. Paragraph C. Who Is An Insured is amended as follows:

1. Paragraph **2.a.** is replaced by the following:
2. Each of the following is also an insured:
 - a. Your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" is an insured for:
 - (1) "Bodily injury", "personal and advertising injury" or other injury:
 - (a) To you, to your partners or members (if

you are a partnership or joint venture), to your members (if you are a limited liability company), or to a co- "employee" while that co-"employee" is either in the course of his or her employment or performing duties related to the conduct of your business;

(b) To the spouse, child, parent, brother or sister of that co-"employee" as a consequence of Paragraph **(1)(a)** above;

(c) For which there is any obligation to share damages with or repay someone else who must pay damages of the injury described in Paragraph **(1)(a)** or **(1)(b)**; or

(2) "Bodily injury", "property damage", "personal and advertising injury" or other injury arising out of his or her providing or failing to provide professional services. However, your "employees" are insureds with respect to their providing or failing to provide services as a manicurist, barber or beautician in connection with your business.

(3) "Property damage" to property:

(a) Owned, occupied or used by;

(b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by: you, any of your "employees", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

2. The following is added to Paragraph **2**:

e. Any operator who rents or leases from the insured booth space, chairs or any portion of your premises for the purpose of conducting manicurist, barber shop or beauty salon services and any "employee" of such operator, but only with respect to liability arising out of such services.

F. Paragraph **D.2. Liability And Medical Expenses Limits Of Insurance** is replaced by the following:

2. The most we will pay for the sum of all damages because of all:

- a. "Bodily injury, "property damage" and medical expenses arising out of any one "occurrence";
- b. "Personal and advertising injury" sustained by any one person or organization arising out of any one "occurrence"; and
- c. Other injury arising out of any one "occurrence";

is the Liability and Medical Expenses limit shown in the Declarations. But the most we will pay for all medical expenses because of "bodily injury" sustained by any one person is the Medical Expenses limit shown in the Declarations.

G. For the coverage provided by this endorsement, the definition of "occurrence" in Paragraph F. Liability and Medical Expenses Definitions is amended to include any act or omission arising out of the rendering or failure to render services as a manicurist, barber or beautician.

33. The Policy is modified by the Communicable Disease Exclusion (BP 14 86 07

13) endorsement, which contains the following relevant language which modifies coverage under the Businessowners Coverage Form:

COMMUNICABLE DISEASE EXCLUSION

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS COVERAGE FORM

The following exclusion is added to Paragraph B. Exclusions in Section II – Liability:

Communicable Disease

This insurance does not apply to "bodily injury" ... arising out of the actual or alleged transmission of a communicable disease.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the:

- a. Supervising, hiring, employing, training or monitoring of others that may be infected with

and spread a communicable disease;

- b. Testing for a communicable disease;
- c. Failure to prevent the spread of the disease; or
- d. Failure to report the disease to authorities.

34. The Policy also contains several pertinent Defined Terms: "Section F.

Liability and Medical Expenses Definitions:"

- 3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

- 5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

- 9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person

or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in Paragraph (2) above and supervisory, inspection or engineering services.

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

35. Lastly, the Policy contains Businessowners Liability Extension Endorsement (No. BP 79 96 09 16) which modifies the Businessowners Coverage Form as follows:

F. Newly Formed Or Acquired Organizations

The following is added to Section **C. Who Is An Insured**:

Any business entity acquired by you or incorporated or organized by you under the laws of any individual state of the United States of America over which you maintain majority ownership interest exceeding fifty percent. Such acquired or newly formed organization will qualify as a Named Insured if there is no similar insurance available to that entity. However:

1. Coverage under this provision is afforded only until the 180th day after the entity was acquired or incorporated or organized by you or the end of the policy period, whichever is earlier;
2. Section **A.1. Business Liability** does not apply to:
 - a. "Bodily injury" or "property damage" that occurred before the entity was acquired or incorporated or organized by you; and
 - b. "Personal and advertising injury" arising out of an offense committed before the entity was acquired or incorporated or organized by you.
3. Records and descriptions of operations must be maintained by the first Named Insured.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

I. Section F. Liability And Medical Expenses Definitions is modified as follows:

1. Paragraph **F.3.** is replaced by the following:
 3. "Bodily Injury" means bodily injury, sickness, disease, or incidental medical malpractice injury sustained by a person, and includes mental anguish resulting from any of these; and including death resulting from any of these at any time.
2. Paragraph **F.9.** is replaced by the following:
 9. "Insured contract" means:
 - a. A contract for a lease of premises. However, that portion of the contract for a lease of

premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf. However, such part of a contract or agreement shall only be considered an "insured contract" to the extent your assumption of the tort liability is permitted by law. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings

and specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

36. The OSIC Policy contains other terms, conditions and exclusions that may limit or preclude coverage for the Complaint in the Underlying Lawsuit.

FIRST CLAIM FOR RELIEF

DECLARATORY RELIEF – DUTY TO DEFEND AND INDEMNIFY PDX NAILS

37. Plaintiff alleges and reincorporates by reference Paragraphs 1 through 36 as though fully set forth herein.

38. PDX NAILS LLC, which is the entity named in this lawsuit, is not listed or scheduled as a named or additional insured under OSIC's Policy.

39. PDX NAILS LLC was not newly acquired or newly formed by PDX NAILS or Hai Ngyuen or Tam Ngyuen during the policy period for OSIC's Policy attached herein as "Exhibit C."

40. Even if PDX NAILS LLC was an insured, which OSIC contests, there is no coverage for "bodily injury" under OSIC's policy as the policy excludes coverage for "bodily injury" arising out of the actual or alleged transmission of a communicable disease.

41. S.R. alleges that she contracted an incurable communicable virus as a result of unsanitary equipment and conditions at PDX NAILS when she was receiving a manicure at the Glisan Street location.

42. OSIC's Policy bars coverage for any tort liability assumed under a contract, so to the extent PDX NAILS LLC has agreed in its incorporation documents filed with the Secretary of State of Oregon to indemnify its owners and members from tort liability arising out of PDX NAILS LLC, coverage is barred.

43. OSIC's Policy covers "bodily injury," "property damage," "advertising injury" and "personal injury" as those terms are defined and according to the terms and conditions, exclusions and limitations of the Policy; to the extent that the Underlying Complaint alleges recovery under private right of action for violation of ORS 646.608, et. seq., and ORS 648.638, that claim does not trigger a duty to defend or indemnify under the OSIC Policy.

44. OSIC's Policy covers "damages" because of "bodily injury," "property damage," advertising injury" and "personal injury" as those terms are defined and according to the terms and conditions, limitations, exclusions and limitations of the Policy; to the extent that the Underlying Complaint seeks a civil penalty under state statute, those are not "damages" under the Policy and a duty to defend and indemnify is not triggered for PDX NAILS LLC.

45. As OSIC's Policy does not cover the "bodily injury" including emotional distress damages and the civil penalties as a result of the private right of action remedy for violation of Unfair Trade Practices against PDX NAILS LLC, OSIC does not have any duty to indemnify PDX NAILS for any damages awarded as a result of the Underlying Lawsuit.

SECOND CLAIM FOR RELIEF

DECLARATORY RELIEF – DUTY TO DEFEND AND INDEMNIFY HAI NYUGEN AND TAM NYUGEN

46. Plaintiff realleges and incorporates by reference Paragraphs 1 through 45 as though fully set forth herein.

47. OSIC’s Policy excludes coverage for liability for “bodily injury” caused by the rendering or failure to render any professional service, including but not limited to “any service, treatment, advice or instruction for the purpose of appearance or skin enhancement, hair removal or replacement or personal grooming,” even if the claims allege negligence or wrongdoing in the supervision, hiring, employment, training or monitoring of others by an insured, if the “occurrence” which caused the “bodily injury” involved the rendering or failure to render any professional service.

48. Acrylic nail application using drill bits and other equipment constitutes “personal grooming” which is performed by licensed and trained nail technicians under Oregon law.

49. Hai Ngyuen and Tam Ngyuen’s liability for damages because of “bodily injury” arising out of rendering or failure to render “personal grooming” is excluded under the OSIC policy.

50. The Underlying Lawsuit alleges S.R. was infected with an incurable, communicable virus (see, allegations she has to bandage her fingers to prevent the spread of the virus) and suffered emotional distress, pain, bodily injury, worry and anguish which would not have occurred but for her infection with the virus at the nail salon.

51. The OSIC Policy excludes “bodily injury” (which per policy definition includes “mental anguish...”) arising out of the actual or alleged transmission of a communicable disease.

52. The OSIC Policy’s communicable disease exclusion applies to claims against Hai Ngyuen and Tam Ngyuen for negligence or wrongdoing in the supervision, hiring, employment, training, monitoring of others, testing for, failure to prevent and failure to report a communicable disease to authorities.

53. As OSIC’s Policy excludes bodily injury including resulting emotional distress and anguish alleged in the Underlying Lawsuit, OSIC has no duty to defend Hai Nguyen and Tam Ngyuen against the allegations in the Underlying Lawsuit.

54. As OSIC’s Policy is not triggered by the Underlying Lawsuit, OSIC has no duty to indemnify Hai Ngyuen or Tam Ngyuen for damages awarded as a result of allegations in the Underlying Lawsuit.

55. For the reasons discussed above, and based on the terms of OSIC’s Policy and the allegations of the Complaint in the Underlying Lawsuit, OSIC has no duty to defend PDX NAILS, Hai Ngyuen or Tam Nguyen in connection with the Underlying Lawsuit.

56. Accordingly, OSIC seeks a judgment from this Court declaring that under the terms of the OSIC Policy, OSIC has no duty to defend PDX NAILS, Hai Ngyuen or Tam Nguyen in connection with the Underlying Lawsuit.

57. As a party to this action, S.R. is bound by the determination of this Court in connection with the relief granted herein.

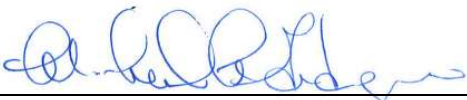
58. OSIC continues to reserve its rights to assert the terms, conditions, limitations and exclusions of the OSIC Policy.

PRAYER FOR RELIEF

1. For a declaration that OSIC has no duty to defend PDX NAILS, Hai Ngyuen, or Tam Nguyen in connection with the Underlying Lawsuit;
2. For OSIC's costs and disbursements herein; and
3. For such other relief as the court deems just and proper.

DATED: October 29, 2024

BULLIVANT HOUSER BAILEY PC

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